

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(Chapter VIII, Rule 32(2)(b))

Description of Case

Criminal Appeal No. 185 of 2007

(Old No. 2305/1983)

With

Criminal Appeal No. 151 of 2007

With

Criminal Appeal No. 186 of 2007

Date of decision : 18th September, 2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date : 18.09.2007

Initials of Judge

Note: Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 185 of 2007
(Old No. 2305/1983)

Gendan Lal S/o Dodh Ram
R/o Village Khunwara
Police Station Sitarganj
District Nainital ...Appellant

Versus

State of U.P. ... Respondent

With
Criminal Appeal No. 151 of 2007

Dodh Ram S/o Sri Dalchan
R/o Village Khunwara
Police Station Sitarganj
District Nainital ...Appellant

Versus

State of U.P. ... Respondent

With
Criminal Appeal No. 186 of 2007

1. Baldeo S/o Nand Ram
2. Babu Ram S/o Nand Ram
3. Ram Bhrosey aila Chhutken S/o Nand Ram
4. Nand Ram S/o Behari
All R/o Village Khunsera,
Police Station Sitarganj
District Nainital ...Appellants

Versus

State of U.P. ... Respondent

Mr. R.S. Sammal, Advocate with Mr. Prem Kaushal and Vishal Singh,
Advocates for the appellants
Mr.G.S.Sandhu, learned Government Advocate for the respondent/State

Coram : Hon'ble Rajeev Gupta, C.J.
Hon'ble J.C.S. Rawat. J.

JUDGMENT

Per Hon'ble J.C.S. Rawat. J.

Since the above three Criminal Appeals have arisen out of the common impugned judgment and order dated 13.09.1983, passed by Sri V.S. Bajpai, the then Special

Judge (Addl. Sessions Judge), Nainital in Sessions Trial No. 163 of 1981, hence all these appeals have been heard together and are being disposed of by this common judgment. By the impugned judgment and order, the appellants Baldev, Gendan Lal, Babu Ram, Ram Bharose alias Chutkan, Dodh Ram and Nand Ram have been convicted & sentenced to undergo imprisonment for life under section 302/149 Indian Penal Code, 1860 (for brevity as I.P.C.) and R.I. for a period of 4 years under section 307/149 I.P.C. Appellants Baldev, Gendan Lal, Babu Ram and Ram Bharose alias Chutkan were also convicted and sentenced to undergo R.I. for a period of one year under section 148 I.P.C. Appellants Dodh Ram and Nand Ram were also convicted and sentenced to undergo R.I. for a period of one year under Section 147 I.P.C. It was further directed that aforesaid sentences shall run concurrently.

2. The prosecution story, in nutshell, is that complainant Nem Chand, his father Udai Ram, his cousin Govind Ram and the accused persons belonged to village Khunsera. The accused/appellants used to bear enmity against complainant and his family members for quite some time. The reason of enmity was that a road was to be constructed in village Khunsara and Udai Ram, father of complainant approached the authorities concerned to change the route of road so that it might pass in front of his 'Crusher'. The authority concerned accepted his request and construction work was started in which certain land of villagers including accused persons was acquitted by the authority concerned. On 06.05.1981, complainant Nem Chand, his father Udai Ram and his cousin Govind Ram went to the house of Ram Lal to attend the 'gauna' ceremony of his daughter. When they

were returning home at about 9:00 p.m., all the accused persons emerged from backside at 'tirah' near the shop of Makhan Lal and surrounded them. Accused Nand Ram and Bodh Ram were armed with *lathis*, accused Baldev & Ram Bharose alias Chutkan were armed with *tabal*; and accused Gendan Lal & Babu Ram were armed with *ballam*. At once, all the accused persons started beating complainant Nem Chand, his father Udai Ram and his cousin Govind Ram with lathis, ballam and tabal. On a hue and cry Om Prakash, Roshan Lal, Kundan Lal PW7, Sirajuddin PW3 and Babu Ram witnesses of the incident arrived on the spot and challenged the accused persons. The accused persons fled away from the spot with their weapons. Complainant Nem Chand, his father Udai Ram and his cousin Govind Ram had sustained the injuries on their persons and fell on the ground. The witnesses had seen the incident in the light of gas lantern (petromax) which was burning in the shop of Makhan Lal situated near the place of occurrence. Thereafter, the witnesses brought the injured to their house. Complainant Nem Chand PW1 wrote a written report Ex.Ka.1 and then went to the police station Sitarganj by a tractor trolley. Complainant Nem Chand PW1 lodged the F.I.R. in the Police Station Sitarganj. On the basis of the F.I.R., chick report (Ex.Ka.6) was prepared and necessary entry was made in the General Diary. Thereafter, the injured were sent to hospital for medical examination. Dr. Ram Swaroop PW6 medically examined the injured persons. On 07.05.1981 at about 4:40 a.m. Udai Ram died in the hospital. Thereafter, the case was converted under section 302 I.P.C. against the accused persons. The case was investigated by S.I. Ramji Lal who recorded the statement of the witnesses; visited the place of occurrence on 07.05.1981; prepared the site plan Ex.Ka.16;

inquest report and other connected papers. He sent the dead body for post mortem at Civil Hospital Haldwani. After completing the investigation, he submitted the chargesheet (Ex.Ka.19) before the court.

3. The accused/appellants were charged u/s 148, 302/149 and 307/149. The accused/appellants denied the charges and claimed to be tried.

4. The prosecution in support of its case examined as many as ten witnesses. Nem Chand PW1 is informant and injured eyewitness of the incident. He is the son of deceased Udai Ram. Govind Ram PW2 is other injured eyewitness of the incident. He is the cousin brother of informant. The prosecution has also adduced the evidence of eyewitnesses Sirajuddin PW3 and Kundan Lal PW7. Dr. P.H. Gupta PW4 is the medical officer who had conducted the post mortem of deceased Udai Ram. Dr. Ram Swaroop PW6 is the Medical Officer who had medically examined the injured persons. Constable Som Dev Sharma PW8 has prepared the chick F.I.R. and entered the case against the accused in the General Diary. He also sent the injured to hospital for medical check up. S.I. Ramji Lal PW9 is the Investigating Officer who investigated the case and submitted chargesheet Ex.Ka.19. Narpal Singh PW10 is the Constable who accompanied the injured from the police station to P.H.C. Sitarganj for medical examination. The prosecution has also filed the affidavit of Const. Suresh Kumar PW5 who had taken the dead body of Udai Ram to Civil Hospital, Haldwani for post mortem.

5. The accused/appellants were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated that they have been falsely implicated due to enmity.

6. The learned Special Judge (Addl. Sessions Judge) on appreciation of the evidence held accused-appellants guilty of the offences charged against them and convicted & sentenced them as mentioned above.

7. We have heard learned counsel for the parties and perused the record.

8. At the outset, it needs to be mentioned here that it is not disputed that injured Udai Ram, Nem Chand PW2 and Govind Ram PW3 sustained the injuries at the spot on the date of occurrence and thereafter, they were taken to P.H.C. Sitarganj where Dr. Ram Swaroop PW6 has medically examined them on the same night. Injured Udai Ram was examined by Dr. Ram Swaroop PW6 on 06.05.1981 at 11:20 and found the following injuries on his person:-

- (1) A lacerated wound 8cm x .5 cm x bone deep over the scalp at the vertex right to the mid line. Fresh blood and clotted blood present. Advised X-Ray.*
- (2) A lacerated wound 16cm x 0.8cm x muscle deep over the middle third of anterior surface of right leg. Fresh blood present. Advised X-Ray.*
- (3) An incised triangular upward bevelled wound 2.5cm x 0.3cm x 0.3 cm over the lower part of back of chest at the level of 10th-11th ribs of left side. Fresh and clotted blood present. Edges clean cut, ends pointed.*

Doctor has opined that all the injuries were fresh in duration. Injury No.1 and 2 had been caused by blunt objects and injury No. 3 had been caused by some sharp edged and pointed object such as bhala.

9. Injured Udai Ram died on 07.05.1981 at about 4:00 in the morning at P.H.C., Sitarganj. The dead body of Udai Ram was sent for post mortem to Civil Hospital, Haldwani. Dr. P.H. Gupta PW4, Autopsy Surgeon, conducted the postmortem of deceased Udai Ram on 07.05.1981 at about 3:20 p.m. and found the following ante mortem injuries on the person of the deceased:-

- (1) *Stitched wound 9cms over right side head 11cms above the right ear.*
- (2) *Traumatic swelling 5cms x 8xms over left side head just above left ear.*
- (3) *Traumatic swelling 3cms x 2 cms over right side head just above the right ear.*
- (4) *Stitched wound 2 cms over the back part of left flank 23cms from umbilicus.*
- (5) *Stitched wound 14 cms over the front and middle part of right leg.*
- (6) *Abrasion 1cm x 1 cm over back and lower part of left forearm.*
- (7) *Traumatic swelling 5 cms x 4 cms over right side of chest internal to the nipple.*
- (8) *Traumatic swelling 4 cms x 4 cms over the dorsum of right foot.*

In the opinion of Medical Officer, the death of the deceased was caused due to ante mortem injuries sustained by him. The Medical Officer further opined that the deceased died in coma which was the result of the head injury. Thus, it is amply proved that the deceased died on account of the injuries sustained by him on the date of occurrence.

10. Dr. Ram Swaroop PW6, Medical Officer has also medically examined injured Nem Chand PW1 on 07.05.1981 at 00:50 a.m. and found the following injuries on his person:-

- (1) *Multiple lacerated wounds (four in number) over the crown of the skull. Measurement ranges from 2cm to 6cm in length. 0.2cm to 0.8 cm in breadth and from 0.2cm to 0.8cm deep. Fresh blood present.*
- (2) *A contusion over the upper part of external surface of left arm 0.5cm x 1.5cm purple in colour. Painful and tender.*
- (3) *A contusion 4cm x 1.5 cm over the right shoulder. Purple in colour. Painful and tender.*
- (4) *A contusion across the upper part of back 22cm x 1.8 cm with clean intervening area giving the appearance of two parallel purple streaks. Painful and tender and purple in colour.*
- (5) *An abraded contusion 2cm x 1.5 cm over the outer surface of right forearm near the elbow. Brownish abraded area and purple contused area.*
- (6) *Contused swelling 4cm x 2cm over the back of right forearm in middle. Painful and tender.*
- (7) *(Wrongly numbered as 6 in the injury report, Ext. Ka -4). An abraded swelling 3cm x 2cm over the inner surface of right knee. Painful and tender. Abraded area brownish.*
- (8) *Pain and tenderness over the bridge of nose. Liquid blood and clotted blood in both nostrils. Advised X-Ray.*
- (9) *Pain and tenderness over the right side of face just in front of right ear mandibular. Advised X-Ray.*

The Doctor has opined that all the injuries were fresh in duration and had been caused by some blunt objects.

11. Dr. Ram Swaroop PW6, Medical Officer has also medically examined the injured Govind Ram PW2 on 07.05.1981 at 00:20 a.m. and found the following injuries on his person:-

- (1) *An incised wound roughly triangular over the front of upper part of abdomen of left side 8cm above to the left navel. Edges clean cut. Ends pointed. Margins purplishly contused. Measures 2cm x 0.8*

cm. The left side is slightly bevelled. Hence cannot be ascertained whether abdominal cavity has been penetrated or not. Clotted and fresh blood present. Catheter, when put into wound, perpendicular to the skin reaches to a depth of 1.2cm.

- (2) A lacerated through and through wound over the upper lip above to left corner of mouth and lying horizontally. Measures 1.5 cm x 0.2 cm. Clotted and fresh blood present.*
- (3) First molar tooth of upper jaw on left side is broken. Clotted blood present. Tartar present. Pyorrhea absent. Advised X-Ray. Gum lacerated and contused.*
- (4) A lacerated wound 7.0 cm x 0.9cm x bone deep over the skull roughly in mid line from the hair line upwards. Clotted and fresh blood present. Advised X-Ray.*

Doctor has opined that all the injuries were fresh in duration. Injury No. 1 had been caused by some pointed, sharp edged weapon, such as, a bhala and the remaining injuries had been caused by some blunt objects. The prosecution has produced the complainant Nem Chand PW1 and Govind Ram PW2 as injured eyewitnesses; Sirajuddin PW3 and Kundal Lal PW 7 as eyewitnesses of the incident. They have categorically stated that the deceased Udai Ram as well as the injured sustained the injuries on 06.05.1981 at about 9:00 p.m. From the perusal of the above evidence, it is clearly established that the deceased Udai Ram died on account of injuries sustained by him on the date of the occurrence. It is further established that complainant Nem Chand PW1 and Govind Ram PW2 also sustained the injuries on the date of incident.

12. Now, we have to consider whether accused-appellants were liable for the offence charged against them. It is also pertinent to mention here that according to the prosecution

evidence, accused-appellants assaulted the deceased Udai Ram and injured Nem Chand PW1 and Govind Ram PW2 with ballams, lathis and tabbal. Accused-appellants Gendan Lal and Babu Ram were holding ballams; accused-appellants Nand Ram and Dodh Ram were holding lathis whereas Baldev and Ram Bharose alias Chutkan were holding tabbal in their hands.

13. The prosecution has adduced the evidence of two injured eyewitnesses i.e. Nem Chand PW1 and Govind Ram PW2 who were accompanying the deceased at the time of incident. The prosecution also adduced two eyewitnesses i.e. Sirajuddin PW3 and Kundan Lal PW7 who had seen the occurrence. Nem Chand PW1 is the son of deceased Udai Ram and Govind Ram PW2 is the nephew of the deceased. According to these injured eyewitnesses, complainant Nem Chand PW1 alongwith his father Udai Ram and his cousin Govind Ram PW2 had gone to the house of Ram Lal to attend 'guana' ceremony of his daughter. When they were returning to their home after attending the 'guana' ceremony and reached near tirah, place of occurrence, at about 9:00 p.m., the accused/appellants emerged from the back of the complainant party and surrounded them. Accused/appellants Gendan Lal and Babu Ram were armed with ballams; accused Nand Ram & Dodh Ram with lathis and the accused Baldev & Ram Bharose alias Chutkan with tabbal. Accused/appellants stated that today these persons had met them and they would not go scot-free. Thereafter, all the accused/appellants started beating complainant party. The complainant party cried on which Sirajuddin PW3, Om Prakash, Roshan Lal, Kundan Lal PW7 and Babu Ram reached at the spot and they saw the incident. Thereafter, accused/appellants fled away

from the scene of occurrence alongwith their weapons which they were holding in their hands. Deceased Udai Ram, Nem Chand PW1 and Govind Ram PW2 sustained the injuries on their persons and they fell on the ground. There was a shop of Makhan Lal situated at a distance of 10 paces from the place of occurrence 'tirah' where gas lantern was burning in which the witnesses recognized accused persons. Thereafter, the witnesses took the injured to their home. Injured Udai Ram became unconscious. Nem Chand PW1 wrote a report and thereafter went to police station to lodge the report. They were medically examined on the same night. In the morning at about 4:30 a.m. on 07.05.1981 Udai Ram died in the hospital. All the witnesses have corroborated the incident in all material particulars. They have supported the prosecution case as disclosed in the F.I.R. in all material particulars and consistently stated that appellants emerged from the back side of complainant party and they have shouted "*gher lo aaj moke se mile han koi bhi jinda bach ke nhi jawe*". Thereupon, they started beating indiscriminately to complainant Nem Chand PW1, Udai Ram and Govind Ram PW2 with the weapons which they were holding in their hands at the time of the incident. We have been taken through the evidence of the eyewitnesses in extenso. Their evidence is quite consistent, natural and all the witnesses have stood the test of lengthy cross examination by the defence. Out of these four witnesses, Nem Chand PW1, Govind Ram PW2 are the injured witnesses who had sustained the injuries in the incident. Dr. Ram Swaroop PW6, Medical Officer, P.H.C. Sitarganj who examined them on the date of occurrence itself alongwith deceased Udai Ram, found that they received injuries on their persons which could be caused by some blunt objects and sharp edged pointed object on their

persons. The duration of all injuries were found fresh. Nothing could be pointed out on behalf of the defence to show that the evidence of these four witnesses including the two injured witnesses is not credible and cogent. It is well settled that in a murder trial merely because a witness is interested or inimical, his evidence cannot be discarded which is otherwise found to be trustworthy. In the present case, we are of the view that the evidence of these witnesses is credible more so when Nem Chand PW1 and Govind Ram PW2 received the injuries in the same incident. There is no rule of law or prudence which requires that the evidence of a close relation must be discarded for the simple reason i.e. they are related to each other. We have no reason to disbelieve their testimony. Similarly, being relatives, it would be their endeavour to see that the real culprits are punished and normally they would not implicate wrong persons in the crime, so as to allow the real cuprits to escape unpunished. The Hon'ble Apex Court has held in **Munshi Prasad Vs. State of Bihar 2002 SCC (Cri) p/175 :-**

“The issue, therefore, is whether the evidence available on record is otherwise trustworthy and an acceptable piece of evidence: in the contextual facts the answer is in the affirmative and both the trial court and the High Court have also considered the same to be so.

(ii) A complaint focused that except the interested witnesses none else from the nearby residential areas has been examined – this is so: it is the quality of the evidence and not the quantity, which is required. The crux of the issue being has the prosecution been able to bring home the charges with the evidence available on record – if the evidence on record is otherwise satisfactory in nature and can be ascribed to be trustworthy, an increase in the number of witnesses cannot be termed to be a requirement for the case”

14. In the case of **State of Punjab Vs. Karnail Singh reported in 2004 SCC (Cri) p/135** the Hon'ble Apex Court has held as under:-

"8. We may also observe that the ground that the witnesses being close relatives and consequently, being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh v. State of Punjab reported in AIR 1953 SC 364 in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J., it was observed: (AIR p/366:-

25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in – Rameshwar v. State of Rajasthan reported in AIR 1952 SC 54 (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

9. Again in **Masalti v. State of U.P. AIR 1965 SC 202** this Court observed:-

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence

should be rejected because it is partisan cannot be accepted as correct.”

15. The Hon'ble Apex Court has held in **Kulwant Singh @ Kulbansh Singh Vs. State of Bihar 2007 AIR SCW 4124** that :-

“9. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused. No evidence has been led in this regard.”

16. Learned counsel for the appellants further contended that the prosecution has admitted that there were other witnesses, namely, Om Prakash, Roshan Lal and Babu Ram but they were not produced before the Court. Learned G.A. refuted the contention. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In determining as to whether any witness is necessary or not,

the court should ask itself as to whether in the facts and circumstances of the case it was necessary to examine such other witnesses, and if so whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable/trustworthy and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 4 witnesses including two injured witnesses – whose presence at the place of the incidents cannot be doubted at all. The genesis of the incident is brought out by these witnesses. The learned trial court has on appreciation of evidence held that the murder of Udai Ram took place near tirah on 06.05.1981 in presence of Nem Chand PW1 and Govind Ram PW2. The trial court has minutely scrutinized the statements of all the witnesses and found them consistent and reliable. We do not find any infirmity in the findings recorded by the trial court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eyewitnesses consistent and reliable in their narration of the incidents. Moreover, it is a well settled position of law that it is not always necessary to multiply the evidence of the incident on the same point. It has to be seen what is the quality of the witnesses. It is the quality of the evidence and not the quantity, which is required. If the evidence available on record is otherwise satisfactory in nature and can be said to be trustworthy then increase in the number of witnesses cannot be the requirement of the case. It has now almost become a fashion that the public is

reluctant to appear and depose before the court especially in criminal cases because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed lot. They are being threatened, intimidated and at the top of all they are subjected to unnecessary lengthy cross-examination. So, the witnesses avoid to come to the court. The evidence of prosecution witnesses is consistent and nothing had been elicited from their cross examination which may render their evidence unreliable. The evidence of the prosecution witness is credible and cogent. We are fortified in our view by the dictum of Hon'ble Supreme Court in **Komal and others Vs. State of U.P. 2002 SCC (Cri) 1600** which is as under:-

“11. Learned counsel next contended that though, according to the statements of witnesses, some villagers had arrived at the place of occurrence when the members of the prosecution party were begin assaulted and they intervened in the matter, none of them has been examined in the case on hand. In our view, non-examination of these witnesses by itself would not affect the veracity of the prosecution case when the evidence of PWs 2 and 4, the two injured eye witnesses who had received multiple injuries, has been found to be trustworthy and their evidence is corroborate by the informant PW 5 and supported by medical evidence as well as objective finding to the investigating Officer.”

17. It has been further held in **Babu Ram vs. State of U.P. 2002 SCC (Cri) 1400** as under:-

“7. It is was submitted by the learned counsel for the appellants that Ram Autar, an independent eye witness present at the scene of occurrence according to the prosecution case and a government servant has not been examined, and therefore, an adverse inference should be drawn against the prosecution. It is settled law that non-examination of an eye-witness cannot be

pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of the pen. An effort should be made at appreciating the worth of such evidence as has been adduced. If the evidence coming from the mouth of the eye witnesses examined in the case is found to be trustworthy and worth being relied on so as to form a safe basis for recording a finding of guilt of the accused persons then non-examination of yet another witness who would have merely repeated the same story as has already been narrated by other reliable witnesses would not cause any dent or infirmity in the prosecution case. In the case at hand we additionally find from the testimony of Ashrafi Lal that in spite of being a government servant and not involved in local village disputes he is afraid of deposing against the accused persons and there is substance in the submission of the learned counsel for the State that Ram Autar if tendered in the witnesses box would have followed the same track as was chosen by Asharfi Lal P.W.3.”

In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case.

18. Learned counsel for the appellants further challenged the presence of all the witnesses at the place of occurrence because Nem Chand PW1 and Govind Ram PW2 were son and nephew of deceased Udai Ram respectively and if they were present at the time of the incident they might have tried to protect the deceased. There is no material on record to show that any such attempt was made by both of the injured witnesses to save the life of the deceased. Learned G.A. refuted the contention. It is pertinent to mention here that in the night at about 9:00 p.m., Nem Chand PW1, Govind Ram PW2 and the deceased Udai Ram were returning from the 'gauna' ceremony of the daughter of Ram Lal. When they reached near place of occurrence i.e. 'tirah', accused/appellants immediately appeared from behind and started beating them indiscriminately. There was no occasion

to save deceased Udai Ram. The accused /appellants were six in numbers while the complainant party was only three in numbers. In such a situation, it cannot be expected from Nem Chand PW1 and Govind Ram PW2 to save Udai Ram when they were themselves being beaten by accused/appellants. The accused/appellants were holding deadly weapons in their hands whereas the complainant party was not having any weapon in their hands. In such a situation, there was no question of providing any assistance by Nem Chand PW1 and Govind Ram PW2 to Udai Ram. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, some become speechless and some stand uprooted from the spot. There is no set of rules of natural conduct. The accused/appellants were armed with deadly weapons and it was natural that Nem Chand PW1 and Govind Ram PW2 could not come forward to save the deceased Udai Ram, particularly when they were causing murderous assault upon the deceased. Only on the ground that Nem Chand PW1 and Govind Ram PW2 did not intervene in the melee cannot be concluded that they were not present at the spot. In the case of **Ashok Kumar Pandey Vs. State of Delhi 2002 (4) SCC 76 & 2002 SCC(Cri) 728**, the father of the deceased was eye-witness of the incident and he was unarmed. The father of the deceased heard cries of his daughter whereupon he immediately rushed towards the place of occurrence and found that the accused was inflicting stab wounds on his daughter with a knife while she was bleeding profusely. The accused came towards him in a state

of anger with knife in his hand and they eye-witness retraced his steps. At this stage, the accused ran away from the place of occurrence. It was pointed out that the father of the deceased saw the accused inflicting injuries on his daughter and he did not take steps to rescue her. It was submitted that the conduct of the eye-witness was unnatural, which shows that he was not present at the place of occurrence. In these circumstances of that case, it was held by the Hon'ble Supreme Court that it cannot be said to be unnatural conduct if he could not take steps to save the life of his daughter as he being unarmed, as an ordinary normal human being, could not have taken risk of his life at the hands of the accused, which was so imminent. In the case of **Balbir Singh & others Vs. State of Punjab & others 2005 (9) SCC 299 & 2005 SCC (Cri) 1245**, the eye-witness (son of the deceased) and the deceased were coming back from the field. The accused persons emerged near the field and inflicted fatal injury on the person of the deceased with deadly weapons. The deceased died at the spot. It was pointed out that since the son of the deceased did not intervene in the fight, hence his presence was doubtful. The Hon'ble Apex Court has held that the evidence of son of the deceased cannot be disbelieved for not having intervened in the melee as there were four assailants who were armed with weapons. In view of the above, the contention raised by the learned counsel for the appellants has no force.

19. Learned counsel for the appellants further contended that the incident took place on 06.05.1981 at about 9:00 p.m. It was further contended that according to the prosecution, gas lantern was burning in the shop of Makhan Lal at 'tirah' near the place of occurrence. The place of

incident was situated at 10 paces from the shop of Makhan Lal. Learned counsel for the appellant further contended that the prosecution has not adduced gas lantern before the court to substantiate its contention. It was further contended that there is evidence of eyewitnesses that there was a peepal tree near the place of occurrence. It was further pointed out that the witnesses have stated that the shadow of the peepal tree covered the shop. On the basis of these evidences, it was pointed out that the accused could not be identified at the place of occurrence. Learned G.A. refuted the contention. The site plan prepared by the I.O. reveals that there was a peepal tree standing nearby the place of the incident. It is not in the evidence that the place of occurrence would not be visible in the light of the gas lantern. The prosecution witnesses Nem Chand PW1, Govind Ram PW2, Sirajuddin PW3 and Kundan Lal PW7 have categorically stated in their evidence that gas lantern was burning at the shop of Makhan Lal. They have categorically stated that they have seen the occurrence in the light of gas lantern. The evidence is credible and cogent and it inspires confidence. There is no obstruction of gas light between the shop of Makhan Lal and the place of occurrence. It is also in the evidence that the time of the incident, there were thin leaves on peepal tree. There is no evidence that the tree was obstructing the view of the place of the incident from the shop. Non-examination of Makhan Lal would not render the admissible evidence insufficient and non-believable. The other witnesses have sufficiently proved the factum and they have seen the incident in the gas lantern & identified the accused/appellants in the gas lantern. It is also on record that the Investigating Officer S.I. Ram Ji Sharma PW9 had taken the gas lantern into his possession and later on handed over the same to

Makhan Lal in *Supurdgi* vide Ex.Ka.20. Thus, it cannot be concluded that the prosecution evidence does not establish any source of light at the place of incident at the relevant time. It is also pertinent to mention that the witnesses have also stated in their deposition that they knew the accused/appellants since before the incident. The prosecution evidence is consistent on this point. The witnesses knew the accused/appellants since before. If the accused/appellants and the complainant party are known to each other, they could identify each other by their voice also. The learned trial court was justified in holding that the presence of lantern at the time of occurrence cannot be doubted. Thus, the contention raised by the learned counsel for the accused/appellants is not tenable.

20. Whereas the motive is concerned, it has categorically been written in the F.I.R. that the complainant had been instrumental in getting a road constructed in front of his 'Crusher' and for that purpose land belonging to appellant Dodh Ram and other villagers were acquired by the authorities concerned. Appellant Dodh Ram was deprived of 1 bigha of land only to construct a road in front of 'Crusher' of the complainant party. It was sufficient motive to cause annoyance to appellant Dodh Ram and his son Gendan Lal. Therefore, the appellant Dodh Ram was having grudge against the complainant party. It is also in the evidence that the work of the construction has completed about 2-1/2 years before the incident. It was pointed out that Nem Chand PW1 had admitted in his evidence that his father Udai Ram used to go out at night alone and if the appellants would have any grievance or grudge against him, they could have settled their score earlier and would not have waited for such long

time. Learned Sessions Judge had rightly held that the accused used to bear enmity against the complainant regarding acquisition of land belonging to the accused as well as other villagers. But the complainant did not take serious note of the threats given by the accused and did not lodge any report with the police would not mean that the accused had not been annoyed with the complainant on his land being acquired. If the complainant had not moved to the authorities concerned for constructing the road in front of his "Crusher", one bigha land of Dodh Ram and Gendan Pal would not have been acquired. The accused/appellants might have waited for some time to pass so that people might come to think that they no longer nourish the desire to take revenge against the complainant. Thus, this motive is sufficient and strong for the accused/appellants to have caused the commission of offence. Therefore, the accused/appellants caused the fatal injuries on the person of Udai Ram and also made an attempt upon the lives of the complainant Nem Chand PW1 and Govind Ram PW2.

21. Learned counsel for the accused/appellants further contended that the prosecution evidence had categorically stated that the accused/appellants were holding tabal, lathis and ballam in their hands. There are two lacerated wounds on the person of the deceased as indicated in para 8 of our judgment. It was further contended that the lacerated wounds could not be caused either by tabal, lathis and ballam. It was further contended that the medical evidence and the ocular evidence on record are inconsistent to each other. Learned G.A. refuted the contention. The prosecution evidence has categorically stated that the accused-appellants Gendan Lal and Babu Ram were holding ballams; accused-

appellants Nand Ram and Dodh Ram were holding lathis whereas Baldev and Ram Bharose alias Chutkan were holding tabbal in their hands. The medical evidence of Dr. Ram Swaroop PW6 clearly shows that the injured had not received punctured wound which is normally caused by spear. Dr. P.H. Gupta PW4 has categorically stated in his evidence that if the edges of tabal would be blunt, it would not cause any incised wounds but would cause lacerated wounds. It is evident that the lacerated wound on the person of the deceased could be caused by tabal. There is no effective cross examination of the said witness on this point. It is now settled position of law that there is no duty of prosecution to clarify which side of the weapon used during the commission of offence and there is no duty of the prosecution witnesses to give such clarification when the direct evidence sufficiently established the assault. The **Hon'ble Apex Court** in the case of **Chaudhari Ramjibhai Narasangbhai Vs. State of Gujrat and others** reported in **(2004) 1 SCC p/184** has held at para 10 as under :-

“10. Above being the position, the plea of the learned counsel for the appellant that it was the duty of the prosecution witnesses to clarify as to which side of the weapon was used is without substance when the direct evidence sufficiently establishes the assaults. In any event, PW6 has stated that the blunt side of the weapon was used.”

Deceased Udai Ram had triangular incised wounds and ballam could cause such injuries. Perusal of the medical examination reports of deceased Udai Ram and injured Govind Ram PW2 shows that they have sustained the incised triangular wounds

on their bodies. It is also in the evidence of doctor that injury No.3 of deceased Udai Ram and injury No. 1 of Govind Ram could be caused by some pointed sharp edged weapons like ballam. Accused/appellants Babu Ram and Gendal Lal were holding ballam in their hands. There are other injuries on the persons of injured which correspond to the weapons which the accused/appellants were holding at the time of the incident. Thus, it is apparent from the perusal of the record that there is no discrepancy between the ocular and the medical evidence.

22. It was further pointed out that doctor has found presence of semi-digested particles of food in the stomach of the deceased Udai Ram during post mortem. It was further contended that the incident would not have taken place at 9:00 p.m. on 06.05.1981; the time of death of the deceased Udai Ram as pointed out in the prosecution evidence did not correspond with the medical evidence. It was further contended that the prosecution evidence has admitted that the deceased did not take food in the house of Ram Lal at the function. It was further contended that according to the prosecution, the death occurred at about 4:00 a.m. in the morning. Learned G.A. refuted the contention. It is well settled position of law that the evidence of doctor is not substantive evidence and it is a corroborative piece of evidence. In the case in hand, there is a direct evidence of Nem Chand PW1, Govind Ram PW2, Sirajuddin PW3 and Kundan Lal PW7 that the incident took place at about 9:00 p.m. on 06.05.1981. The medical evidence could not be made the sole criteria to determine the time of death on the basis of food found in the stomach of the deceased. In some cases, when the deceased remain in coma, the digestibility

may remain in abeyance for that period. There are many factors effecting the digestion of a person. It is also pertinent to mention that there is no evidence that when the deceased Udai Ram took food before the incident. In absence of such positive evidence, it cannot be concluded that there is variation in between the medical evidence and ocular evidence. Learned counsel for the accused/appellants had not made any effective cross examination of doctor to that effect. The learned Sessions Judge was justified in holding that there is sufficient evidence to prove that the incident took place at 9:00 p.m. on 06.05.1981 and there is no use to showing change of the time of occurrence. The Hon'ble Apex Court in the case of **State of M.P. Vs. Dharkole alias Govind Singh and others** reported in **2005 SCC (Cri) 225** has held in para 8 and 9 as under :-

“8. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers to medical witnesses to exclude the eyewitnesses’ account which had to be tested independently and not treated as the “variable” keeping the medical evidence as the “constant”.

9. It is trite that where the eyewitness’ account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses’ account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the “credit” of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such

evidence becomes eligible to be put into the scales for a cumulative evaluation.

Thus, we do not find any force in the contention raised by the learned counsel for the appellants.

23. The incident took place at 9:00 p.m. on 06.05.1981 and Nem Chand PW1 reported the matter to police station Sitarganj on 06.05.1981 at 10:40 p.m. The distance between the police station and the place of occurrence is about 7 kms. It is also in the evidence that the complainant party sustained the injuries at the place of incident and thereafter they were brought home by the witnesses. Injured Nem Chand PW1 scribed the report and went to police station Sitarganj alongwith Udai Ram and Govind Ram PW2. Thus, there is a prompt F.I.R. The prompt FIR thus inspires confidence that it was not the outcome of any consultation or deliberation. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. The fact that the accused/appellants caused fatal blows upon the deceased Udai Ram and injured

persons further stands corroborated by the prompt FIR in which the name of the accused/appellants have been shown.

24. After considering the entire evidence of the eyewitnesses, the trial court found the evidence to be implicitly truthful and reliable though their presence was attempted to be shown as doubtful. We do not find any reason to accept the plea. Their presence at the place of incident was explained and their evidence cannot be thrown out as unreliable or tainted merely because the injured witnesses are related to the deceased and the other witnesses are also of the same vicinity where the accused and injured persons reside. This circumstance would not warrant mechanical rejection of the testimony. Evaluation with caution was needed which has been done. The manner of assault as described by the eyewitnesses is also corroborated by the medical evidence. The prosecution in support of its case as we have noticed earlier examined four eyewitnesses, namely, Nem Chand PW1, Govind Ram PW2, Sirajuddin PW3 and Kundan Lal PW7. Out of whom Nem Chand PW1 is the informant himself. He is an injured witness. His injuries were examined by Dr. Ram Swaroop PW6 who found nine injuries on different parts of his body. Govind Ram PW2 is also an injured witness who was examined by Dr. Ram Swaroop PW6 who found four injuries on his person. The prosecution case disclosed by them is also supported by the subsequent evidence of Sirajuddin PW3 and Kundal Lal PW7. They have consistently supported the case during investigation as well as in the Court. They have supported the prosecution case in all material particular and no infirmity could be pointed out in their evidence. The evidence of injured eyewitness stands on a higher pedestal

than any other witness. The injured witness is most competent witness and his presence at the place of occurrence cannot be ruled out {**See Narendra Nath Khaware Vs. Parasnath Khaware and others 2003 SCC (Cri) 1144 and State of U.P. Vs. Kishan Chand and others 2004 SCC (Cri) 2013**}. The injured eyewitness being related to the deceased Udai Ram would be last person on earth to adopt the course by which some innocent persons would be convicted in place of really guilty of the murder of the deceased. On a conspectus of various relevant features of the case including the genesis; the nature of the incident; the nature of the weapon carried by the accused at the seen of the occurrence, it cannot be concluded from the prosecution evidence or from any probability arising from the record that the accused had been falsely implicated in the case. After going through the same, we do not find any reason to disbelieve the version of the prosecution witnesses. We are completely in agreement with the findings recorded by the trial court and we find that the prosecution has been able to establish the case beyond reasonable doubt.

25. Learned counsel for the appellants further contended that if the appellants are held guilty for inflicting fatal injuries on the person of deceased Udai Ram, then the appellants are liable for culpable homicide not amounting to murder as they lacked the requisite intention to cause the death. It was further contended that the scenario projected in the evidence of the prosecution clearly rules out the application of Section 302 I.P.C. It was further contended that the prosecution evidence clearly shows that the deceased died due to head injury which was a lacerated wound over the scalp at the vertex right to the middle line. In essence it was contended

that Section 302 I.P.C. had no application and in essence Fourth exception of Section 300 I.P.C. applied. Learned G.A. refuted the contention and supported the judgment passed by the trial court. The pivotal plea taken by the appellants relates to the applicability of Exception 4 of 300 I.P.C. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage. The Forth Exception of Section 300 I.P.C. covers acts done in a sudden fight. According to the prosecution, the accused/appellants had concealed themselves and they were waiting for the arrival of the deceased Udai Ram, his son Nem Chand PW1 and his nephew Govind Ram PW2 near 'tirah', the place of incident. When they reached at the place of occurrence, the accused/appellants came from behind and surrounded them. The accused/appellants were armed with lathis, ballam and tabbal. It is also in the evidence that the complainant party had no weapon in their hands at the time of incident. As we have noticed earlier that the accused/appellants were having dangerous weapons in their hands, there was no provocation, sudden quarrel or mutual fight. The accused/appellants dealt blows upon the deceased Udai Ram and injured Nem Chand PW1 and Govind Ram PW2 with great force causing serious injuries on the vital part of the deceased and injured. The head injuries which the deceased Udai Ram sustained in the incident were sufficient in the ordinary course of nature to cause death.

26. In **Virsa Singh Vs. State of Punjab AIR 1958 SC 465 & 1958 Cr.L.J. 818**, the Hon'ble Supreme Court has held that a culpable homicide is a murder under section 300 clause

III. If the prosecution should establish four elements – (i) the presence of a bodily injury, (ii) nature of such bodily injury, (iii) intention on the part of the accused to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and (iv) the injury was sufficient to cause death in the ordinary course of nature. Dealing with the question, as to how intention is to be inferred, **Vivian Bose J.** succinctly stated :-

“In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted.

The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.”

27. We have given our thoughtful and anxious consideration to the rival contentions of the learned counsel for the parties. The intention which is a state of mind cannot be proved by

the direct evidence as a fact. It can only be inferred from the facts and circumstances of each case. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under section 302 or 304 Part-I or 304 Part-II. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. In the present case, as noticed above, the accused/appellants emerged at the place of incident with deadly weapons in their hands. The deceased Udai Ram and injured Nem Chand PW1 and Govind Ram PW2 were not having any weapon at the time of incident. The accused/appellants inflicted a number of blows by the deadly weapons which they were holding at the time of incident. The injury reports which have been indicated in preceding paragraphs 8 to 11 of our judgment clearly indicate that there was indiscriminate assaulting by the accused/appellants. It is also revealed that the

accused/appellants emerged at the place of incident with intention to cause fatal bodily injuries on the person of deceased Udai Ram and injured Nem Chand PW1 and Govind Ram PW2. Thus, it is apparent that accused/appellants caused indiscriminate assaults on the person of deceased as well as injured persons. Thus, it cannot be said by any stretch of imagination that there was no intention to cause the death of the deceased. There was no indication of any cause for apprehension on the part of accused/appellants that deceased Udai Ram and injured Nem Chand PW1 and Govind Ram PW2 might attack them. The accused/appellants caused the injuries on the vital part of the body of deceased which were sufficient in the ordinary course of nature to cause death. On internal examination of the deceased regarding head injury, Dr. P.H. Gupta PW4 has found fracture of frontal, right & left parietal bones and membranes lacerated. Brain was lacerated on both sides and clotted blood was present on both sides. According to the opinion of the doctor, the ante mortem injuries were sufficient to cause the death of the deceased. The deceased had died in coma which was the result of head injury. Considering the evidence in the light of above, we are of the opinion that the case does not fall under Section 304 I.P.C. We are of the opinion that the accused/appellants had committed the offence punishable u/s 302 I.P.C. Therefore, the trial court has rightly convicted the accused/appellants u/s 302 I.P.C. Thus, we do not find any force in the contention raised by the learned counsel for the appellants.

28. In the case in hand the accused/appellants were also convicted u/s 307/149 I.P.C. It was further contended that keeping in view of the evidence of the prosecution, the

offence could not be said to be one covered under Section 304/149 I.P.C. Learned G.A. refuted the contention. To constitute an offence u/s 307 I.P.C. two ingredients of the offence must be present – (i) an intention of or knowledge relating to commission of murder; and (ii) the doing of an act towards it. Section clearly contemplates an act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention or knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of Section 307, there can be no offence 'of attempt to murder'. Intent which is a state of mind cannot be proved by precise direct evidence, as a fact it can only be detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used, the place where injuries were inflicted, the nature of the injuries and the circumstances in which the incident took place. On the evidence on record, the prosecution has established that accused/appellants caused nine injuries on the person of Nem Chand PW1. The details of injuries have been indicated in preceding paragraph 10 of our judgment. The accused/appellants further caused four injuries on the person of Govind Ram PW2 as indicated in preceding paragraph 11 of our judgment. As per the opinion of doctor, the injuries were caused either by blunt object or pointed sharp edged weapon on the person of injured Nem Chand PW1 and Govind Ram PW2. Thus, the evidence of prosecution constitutes the intention or knowledge of the accused/appellants for committing the murder or doing an act towards it. The accused-appellants had intention to cause the death of the injured Nem Chand PW1 and Govind Ram PW2 also and they

attempted for the same. It is also in the evidence that the witnesses reached at the spot and when the witnesses challenged the accused/appellants, they fled away from the spot. If the witnesses had not intervened, the accused/appellants would have caused further injuries on the persons of the complainant party. They were saved due to intervention of the witnesses. We do not find any substance in the contention advanced by the learned counsel for the accused/appellants.

29. Learned counsel for the appellants further contended that the accused/appellants had no common object to commit the offence as charged against them. On the other hand, learned G.A. refuted the contention and contended that all the accused/appellants assaulted indiscriminately with the arms which they were holding at the time of incident simultaneously and each of them took part in the beating of the deceased and injured persons and it can safely be inferred that all the accused/appellants had come with a common object of killing deceased Udai Ram as well as injured Nem Chand PW1 and Govind Ram PW2 at the spot. Perusal of the record reveals that the accused/appellants had formed unlawful assembly with the common object to commit the riot and to cause fatal injuries to deceased Udai Ram and injured Nem Chand PW1 and Govind Ram PW2 and to commit the murder of complainant party. It is evident from the prosecution evidence that all accused/appellants emerged at the spot all of a sudden and shouted '*gher lo aaj moke se mile han koi bhi jinda bach ke nahi jawe*' and thereafter they started indiscriminate beating of the complainant party.

30. For the purpose of attracting section 149 IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose. In the case of **Bishna Vs. State of W.B. 2006(1) SCC (Cri) 696** has held that :-

“63.Mizaji v. State of U.P. 1959 Cri. L.J. 777 it was observed:

“Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression ‘know’ does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all.”

In Masalti V. State of U.P., AIR 1965 SC 202, it was held:-

“17. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or

continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.”

31. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

32. The Hon'ble Supreme Court in **Bhajan Singh v. State of U.P. 1974 SCC(Cri) 604:-**

“13. Section 149 IPC constitutes, per se, a substantive offence although the punishment is under the section to which it is tagged being committed by the principle offender in the unlawful assembly, known or unknown. Even assuming that the unlawful assembly was formed originally only to beat, it is clearly

established in the evidence that the said object is well knit with what followed as the dangerous finale of, call it, the beating. This is not a case where something foreign or unknown to the object has taken place all of a sudden. It is the execution of the same common object which assumed the fearful character implicit in the illegal action undertaken by the five accused.”. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly.

33. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. When

an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object.

34. The Hon'ble Supreme Court has observed in the case of **Masalti Supra**, which is as follows:-

“15. Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not.”

16.

17. Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the

principle that the punishment prescribed any Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.”

35. The above decisions was also followed in the decisions of the Hon'ble Apex Court in **Charan Singh & others Vs. State of U.P. 2004(4) SCC 205, Ram Dular Rai Vs. State of Bihar 2003(12) SCC 352 and Bishna Vs. State of W.B. 2006 (1) SCC(Cri) 696.**

36. In the facts and circumstances of the present case, we can safely hold that the accused/appellants reached at the spot with common object to kill the members of the complainant party and they in furtherance of the said common object caused grievous injuries on the complainant party, out of which, one died and two sustained the injuries. We have been taken through the evidence and cross examination of the witnesses by the learned counsel for the appellants. After going through the same, we do not find any reason to disbelieve the version of the prosecution witnesses. We are completely in agreement with the findings recorded by the trial court in this regard. Thus, we do not find any force in the contention raised by the learned counsel for the appellants.

37. In view of the aforesaid reasons, we hold that the prosecution has established the guilt beyond reasonable doubt against the accused-appellants. We find that the learned trial court has rightly convicted and sentenced the accused-appellants and there is no infirmity in the impugned judgment and order passed by the learned trial court in Sessions Trial No. 163 of 1981. The accused-appellants are

liable to be convicted and sentenced as warded by the trial court. Hence, the appeal is liable to be dismissed and is hereby dismissed.

38. The accused-appellants are on bail. Their bails are cancelled. They shall be taken into custody forthwith by the court concerned to make them serve out the sentence as awarded against them.

39. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within three months from the date of receipt of order.

(J.C.S. Rawat, J.) (Rajeev Gupta, C.J.)

Dated 18th September, 2007
Shiv

